IN THE UNITED STATES OF BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
MIRANT CORPORATION, et al.,	§	Case No. 03-46590
	§	Jointly Administered
Debtors.	§	Chapter 11

MIRANT AMERICAS ENERGY MARKETING, LP,	§	
Plaintiff,	§	
	§	
vs.	§	
	§	Adversary No. 04-04240-dml
PACIFIC GAS & ELECTRIC COMPANY,	§	
Defendant.	§	

MIRANT CORPORATION, MIRANT AMERICAS ENERGY MARKETING, LP MIRANT CALIFORNIA, LLC, and MIRANT AMERICAS GENERATION,	§	
Plaintiffs,	§	
	§	
vs.	§	Adversary No. 04-04241-dml
	§	
SOUTHERN CALIFORNIA EDISON,	§	
Defendant,	§	

MIRANT CORPORATION, MIRANT AMERICAS ENERGY MARKETING, LP, MIRANT POTRERO, LLC, MIRANT DELTA, LLC, MIRANT CALIFORNIA INVESTMENTS, INC. and MIRANT CALIFORNIA, LLC,	§	
Plaintiffs,	§	
	§	
vs.	§	Adversary No. 04-04243-dml
	§	
CALIFORNIA DEPARTMENT OF WATER RESOURCES,	§	
Defendant	§	

MIRANT AMERICAS ENERGY MARKETING, LP, Plaintiffs,	§	
vs.	§	Adversary No. 04-04242-dml
CALIFORNIA POWER EXCHANGE CORPORATION, Defendant.	§	

MIRANT AMERICAS ENERGY MARKETING, LP, Plaintiffs,	§	
vs.	§	Adversary No. 04-04244-dml
CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION, Defendant.	§	

Report and Recommendation of Bankruptcy Judge

TO: Honorable John H. McBryde, United States District Judge

Comes now Dennis Michael Lynn, U.S. Bankruptcy Judge, and makes this, his report and recommendation regarding motions to withdraw the reference (the "Motions") filed in the above-captioned adversary proceedings (the "Adversaries") by the Defendants named therein:

1. Your bankruptcy judge considered the Motions at a status conference held on September 1, 2004. At the conclusion of the status conference, the parties were invited to submit additional materials addressing issues discussed during the status conference.

2. Having reviewed the Motions and the papers filed in connection with them both before and after the status conference, your bankruptcy judge believes the various parties have fully reviewed the law[1] pertinent to consideration of whether the District

[1] Defendants' citations (e.g., Omnibus Reply to Oppositions to Motion to Withdraw the Reference filed by California Power Exchange Corporation, p. 4, n. 3) typically overlook the issue which your bankruptcy

Court should withdraw the reference with respect to the Adversaries. Your bankruptcy judge accordingly will not address the arguments of the parties in detail in the belief that such a rehash of the authorities would not be of benefit to the District Court. The arguments made by the Official Creditors' Committee of Mirant Corp. (the "Committee")[2] are consistent with your bankruptcy judge's view of the Motions.

3. Your bankruptcy judge recommends the reference not be withdrawn as to the Adversaries. It appears unlikely that consideration of the Adversaries will require interpretation of the Federal Power Act (the "FPA") or any other federal statute other than the Bankruptcy Code, and the Adversaries are thus not subject to mandatory withdrawal of the reference. Because the process of claims resolution and associated issues are central to the reorganization of a debtor, permissive withdrawal is also not appropriate.

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judge believes central: whether the Motions seek withdrawal of the reference for reasons which support dismissal of the Adversaries rather than withdrawal of the reference by the District Court under 28 U.S.C. § 157(d). Specifically, the cases Defendants cite under section 157(d) involve resolution of the merits of a controversy such as the existence and amount of liability under a federal statue. *See* Southern Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc., 252 B.R. 373 (E.D. Tex. 2000) (district court withdrew reference to determine whether CERCLA settlements included in plan of reorganization should be approved); Pension Benefit Guar. Corp. v. LTV Corp. (In re Chateaugay Corp.), 86 B.R. 33 (S.D.N.Y. 1987) (district court withdrew reference to determine whether reinstatement of debtor's previously terminated pension plan covered by ERISA violated the automatic stay); Carter Day Indus., Inc. v. United States Envtl. Prot. Agency (In re Combustion Equip. Assocs., Inc.), 67 B.R. 709 (S.D.N.Y. 1986) (district court withdrew reference to determine whether CERCLA cause of action arose before or after debtor's bankruptcy filing) *aff'd*, 838 F.2d 35 (2d Cir. 1988); U.S. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 63 B.R. 600 (S.D.N.Y. 1986) (district court withdrew reference to determine whether CERCLA cause of action arose before or after debtor's bankruptcy filing). As discussed below, Defendants do not ask (as was true in those cases) that the District Court withdraw the reference to make a determination on the merits; rather, Defendants wish the reference to be withdrawn to the District Court as a first step to dismissal in favor of proceedings before the Federal Energy Regulatory Commission ("FERC").

[2] The Committee has filed motions to intervene in the Adversaries. Your bankruptcy judge has granted the Committee permission to intervene for the limited purpose of opposing the Motions. Consideration of the Committee's intervention generally in the Adversaries has been postponed pending resolution of the Motions.

4. Although Defendants argue that adjudication of the Adversaries will require consideration of the FPA, in fact their position is that the Adversaries should be dismissed in deference to proceedings before FERC. Plaintiff and the Committee argue that the Adversaries do not affect pending FERC proceedings. Whether they or Defendants are correct should be determined in the context of a motion to dismiss,[3] not a motion under 28 U.S.C. § 157(d).

5. Plaintiff and the Committee concede that FERC will decide the quantification of claims by and against Plaintiff. The Adversaries therefore will require only that the trial court accept the conclusions of FERC regarding the claims in applying the Bankruptcy Code to those claims. If Plaintiff seeks relief which would impede or contradict adjudication of matters before FERC or which would interfere with FERC's rightful jurisdiction over property in its possession, dismissal or abstention (or, if appropriate, issue preclusion) would be in order. Where, as here, withdrawal of the reference is sought not based on statutory conflicts which could affect determination of the merits of the Adversaries but rather because of potentially parallel pending proceedings, it should be denied. Withdrawal of the reference is meant to provide to a party the option of a determination of the merits of a matter by the District Court as opposed to the bankruptcy court, and that is not the reason Defendants filed the Motions.

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[3] Defendants have filed motions to dismiss the Adversaries on which motions Defendants rely heavily in their arguments for withdrawal of the reference. Justification for dismissal (or abstention), however, does not constitute a basis for withdrawal of the reference. Dismissal and abstention are in the first instance properly issues for the bankruptcy court. The District Court's docket need not be cluttered with matters as to which the reference is withdrawn only in order for the District Court (as opposed to the bankruptcy court) to consider their summary disposition.

6. Moreover, it was not, in fact, Plaintiff that invoked the jurisdiction of the bankruptcy court. Defendants, by filing proofs of claim, have asked to participate in the division of the estate held in *custodia legis* by the bankruptcy court. Defendants, seeking the status of secured creditors[4], lay claim to a preferential share in the estate. By claiming secured status, Defendants argue that they have a right to property of the estate. 11 U.S.C. § 506(a) (a claim "is a secured claim to the extent of the value of such creditor's interest in the *estate's interest* in . . . property") (emphasis supplied). In the Adversaries, Plaintiff asks only that the bankruptcy court deal with claims asserted against Debtors' estates and with property apparently admitted by Defendants to be property of the estate. The face value of the claims against Plaintiff and the claims that are estate property will be determined by FERC. If the estate property is directly or indirectly held in *custodia legis* by FERC, its disposition may be subject exclusively to FERC's orders, and portions of the Adversary should be disposed of by dismissal or abstention. The claims against Plaintiff, however, are clearly subject to objection before the bankruptcy court where, as here, there is no attempt to circumvent FERC's quantification function.[5] If estate property that is not subject to a prior trust (or that has been released from the prior trust) is implicated, then the bankruptcy court should be able to determine that property's ownership and the interests in such property of creditors.

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[4] One defendant, California Independent System Operator Corporation, did not file its claim as secured.

[5] Whether disposition of the claims by and against Plaintiff and Defendants is determined under the auspices of FERC or the bankruptcy court may affect the value of the parties' respective claims, thus motivating the parties to prefer one or the other forum. This, however, does not affect allocations of jurisdiction.

7. Defendants might have avoided bankruptcy court jurisdiction by not filing claims and simply relying on their "collateral". A secured creditor is not required to file a claim if it decides to rely on its collateral. *Simmons v. Savell* (*In re Simmons*), 765 F.2d 547, 551 (5th Cir. 1985); *In re Baldridge*, 232 B.R. 394, 396 (Bankr. N.D. Ind. 1999); *Nissan Motor Acceptance Corp. v. Daniels* (*In re Daniels*), 163 B.R. 893, 896 (Bankr. S.D. Ga. 1994). Having filed a claim in Debtors' cases, it is unreasonable for Defendants to argue, in effect, that it is FERC (not the bankruptcy court or the District Court) which must determine not just the quantification of the claims but also their status under 11 U.S.C. § 506(a) and their allowability.
8. The foregoing reasons support denial of mandatory withdrawal and are also some of those which lead your bankruptcy judge to recommend against withdrawal of the reference on discretionary grounds. Dealing with claims is central to the chapter 11 process. Not only distribution but liability (as among debtors), consolidation, classification, and confirmation will require consideration of Defendants' claims. The Supreme Court has often pointed to the adjustment of the debtor-creditor relationship as a key core function of the bankruptcy court. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71, 102 S. Ct. 2858, 2871 (1982); *see also Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S. Ct. 330, 331 (1990); *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 56 n.12, 109 S. Ct. 2782, 2798 n.12 (1989).
9. Moreover, there are very likely numerous other, similar claims in Debtors' cases. Much of Debtors' business is subject to regulation by FERC, and it is probable that other claims against Debtors are related to pending FERC proceedings. It would

encourage forum shopping between the bankruptcy court and the District Court if the Motions were granted on a discretionary basis, since granting the Motions would suggest that any nexus between bankruptcy proceedings and proceedings before FERC would justify withdrawal of the reference.

10. Finally, FERC is a party in interest in Debtors' cases. FERC did not appear in connection with the Motions. As the District Court is aware FERC has in the past been diligent in protecting its jurisdiction over Debtors' affairs. Your bankruptcy judge infers from FERC's silence that it does not perceive the Adversaries as a threat to its jurisdiction or powers.

For the foregoing reasons, as well as based on the law as expounded by the parties, I respectfully recommend that the Motions be denied.

Signed this the _____ day of September 2004.

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Hon. Dennis Michael Lynn,
United States Bankruptcy Judge